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6 DOMESTIC VIOLENCE TASK FORCE VIRTUAL MEETING

7 January 31, 2022

8 Held via Webex

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10 PRESENT:

11 Hon. Anna Barbara Hantz Marconi,

12 Associate Justice, New Hampshire Supreme Court

13 Hon. Susan Carbon, Circuit Court Judge

14 Hon. John Yazinski, Circuit Court Judge

15 Merrill Beauchamp, Director, Victim &

16 Witness Program

17 Kathy Beebe, Executive Director, Haven NH

18 Kristyn Bernier, Investigator, Belknap

19 County Attorney's Office

20 Steven Endres, Assistant County Attorney,

21 Merrimack County

22 Martha Ann Hornick, Grafton County

23 Attorney

24 Mary Krueger, Attorney, NHLA

25 Lynda Ruel, Director, Office of



1 Victim/Witness Assistance, NH DOJ
2 Amanda Grady Sexton, Director of Public
3 Affairs, New Hampshire Coalition
4 Jon Strasburger, New Hampshire
5 Association of Criminal Defense Attorneys
6 David Vicinanzo, Attorney, DOVE Program
7 Patricia LaFrance, Partner, The Black Law
8 Group
9 Pam Dodge, NHBA DOVE Program & 603 Legal
10 Sarah Freeman, NHJB, Circuit Court
11 Administrator
12 Jean Kilham, NHJB Domestic Violence
13 Program Manager
14 Erin Jasina, Director, NHLA DV Program
15 Anne Zinkin, NHSC Supervisory Law Clerk
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1 JUDGE HANTZ MARCONI: It is the
2 January 31st -- eighth -- meeting of the
3 task force on review of domestic violence
4 cases in the judicial system. This is
5 the grab bag meeting for, quote, all
6 other relevant areas. And we have
7 identified several, which is on the
8 agenda that was sent around.

9 So we have, in no particular order,
10 offenders using the judicial system to
11 further harass, coerce, control victims,
12 and RSA 173-B:I-(a) (3); (audio
13 interference) for law enforcement on best
14 practices for handling weapons seizures;
15 co-occurrence of child abuse and domestic
16 violence cases; whether there should be
17 an exception under the wiretapping
18 statute for domestic violence survivors
19 so that that they may obtain evidence of
20 the abuse without committing a crime and
21 so that the evidence is admissible;
22 judicial accountability, which may rise
23 to the top.

24 And I've added but not on the agenda
25 crisis center feedback. We've been

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1 monitoring the comments as they've come
2 in, and there is some anecdotal
3 information about individuals either
4 being unable to be helped or not being
5 helped, and also some anecdotal
6 information from within the branch that
7 some advocates are not as helpful as they
8 might be. So this kind of goes with one
9 of the topics we discussed before, which
10 is how do you provide feedback outside of
11 this task force, if you will.

12 So in no particular order, I'd like
13 to have people talk about what's top of
14 mind.

15 MS. LAFRANCE: So I -- I guess I'll
16 start just on the topic of the amendment
17 to the wiretap statute. This is -- I
18 mean, in -- this comes up so often in my
19 cases. And I -- I have often said that
20 it should be amended to some kind of
21 safety exception, I guess akin to, I
22 don't know, the rationale behind, like,
23 hot pursuit or exigent circumstances. So
24 you know, I've always said that.

25 I run into it a lot in my practice.



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1 I'm very familiar with the wiretap
2 statute. I used to authorize them for
3 undercover police officers, so I know the
4 ins and outs of it. I think there's
5 multiple interpretations of when somebody
6 can record. I don't know if any of the
7 other attorneys feel the same way.

8 Because I always tell my client,
9 obviously, you know, if you're out in
10 public -- if, you know, that's fine.
11 If -- the issue comes with -- when
12 somebody has a phone and it's out and
13 it's clear they're recording. And they
14 say, I'm recording, right. And to me,
15 you know, if -- if that other person
16 continues talking -- and this might be a
17 wrong interpretation of it -- but you
18 know -- if -- if that person knows
19 they're being recorded, then they have
20 ultimately consented to being recorded,
21 even though, you know, they may say I
22 don't -- I don't give you permission to
23 record me. Well, if you're phone's out
24 and it's clear you're recording, then --
25 I don't know.

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1 I don't know if anybody else has a
2 different interpretation, but I think the
3 statute --

4 JUDGE HANTZ MARCONI: Who would
5 be --

6 MS. LAFRANCE: -- it's open for
7 interpretation.

8 JUDGE HANTZ MARCONI: Who would be
9 the so-called involved persons, parties,
10 to, sort of, take this concept to the
11 legislature? And anyone else can weight
12 in, too.

13 MS. LAFRANCE: Yeah --

14 MS. SEXTON: I'll just say that the
15 Coalition has had this on our, sort of,
16 wish list for many years and have worked
17 with parties. And there are interested
18 legislators in bringing this forward.

19 It's just a matter of doing that when the
20 timing is right and when it's, sort of,
21 the correct time to do that.

22 INV. BERNIER: I think also it needs
23 to be fleshed out really specifically.
24 I've done -- I've had, you know,
25 authorization for undercover drug work.



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1 I've also gotten plenty of -- which
2 goes -- is different than when we go for
3 that -- the pretext call on a sexual
4 assault or a domestic violence case when
5 we want to do the phone call through the
6 AG's office. Different set of standards
7 in terms of what we can and can't do.

8 And really defining what is a safety
9 exception because these recordings can
10 simply be to -- can be used to rile
11 someone up. They can be, you know,
12 recorded, and then they never come
13 forward; that's not an exigence.

14 Holding, you know -- to play devil's
15 advocate because I've seen these cases
16 too many times. It's a safety exception
17 and they're in fear for their safety and
18 they record, I'm all for it.

19 But the -- the other thing is -- is
20 how do you define something that can be
21 legislated that doesn't end up being
22 someone just recording things and
23 sticking them in a file somewhere --
24 where -- for when they decide they want
25 to pull it all forward.



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1 And I think that's what makes this
2 issue so difficult, is setting what those
3 parameters are. And I think the
4 parameters are going to be the key to
5 getting the legislation passed. Because
6 if there are too many open doors and too
7 many ways that someone can, you know,
8 exploit it for -- for not the purpose
9 it's supposed to be used for, you're
10 going to be less likely to get it passed.

11 So it -- it -- the -- it's not so
12 much of who's going to take it, it's
13 who -- who's going to craft it and make
14 sure that it's rock-solid so that it --
15 and it's been vetted out -- so that it
16 does pass for the purpose for which it's
17 being passed.

18 JUDGE HANTZ MARCONI: The law
19 enforcement that works with this statute
20 should be involved, is what I'm hearing.

21 INV. BERNIER: Well, you know,
22 that -- which is -- it, you know, if --
23 if something's exigent -- I mean, for the
24 purposes of crafting it, absolutely.

25 Is it going to be something that



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1 somebody can, you know, take it to the PD
2 because they're worried about something?

3 Or there's a -- there's a DV order in the
4 process or whatever. Or -- I mean, I
5 think we -- there's a lot of different
6 scenarios where this could come into play
7 and be useful for the right reasons
8 and -- but I think it's going to take a
9 team of people to -- to hammer this out.

10 MS. JASINA: So NHLA has also within
11 the last year been approached by another
12 stakeholder who is interested in making
13 some amendments to the wiretapping
14 statute, which would allow for an
15 exception from prosecution if somebody
16 were recording while abuse is occurring
17 and that -- and then that would be
18 admissible evidence.

19 So we would certainly be interested
20 in partnering with them and any other
21 interested stakeholders that would like
22 to see something like this pass, which
23 would hopefully address some of the
24 concerns that were just raised.

25 So I'm happy to reach out to that



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1 stakeholder as a -- actually, I've
2 already done it. I talked to Jean about
3 that, and they're interested in convening
4 a group. And I think between NHLA and
5 that group -- I think, you know, we could
6 get something organized maybe over the
7 summer to, kind of, flesh this out a
8 little bit more.

9 MS. RUEL: And I took -- I took a
10 poll of the systems-based advocates --
11 and you know, Merrill jump in if you --
12 if I forget something. They, too, think
13 it would be a great idea. They do have
14 some concerns around victim safety and
15 victims feeling like it's their
16 responsibility to gather their evidence
17 in their case. So I just -- as we move
18 forward just thinking about some of those
19 things would be helpful for the -- the
20 process of getting a resolution.

21 As Kristyn pointed out, you know,
22 it -- it would need to be crafted for
23 the -- for the intent it is intended
24 for -- if I'm saying that right -- and
25 not be used as another tool.



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1 INV. BERNIER: Here's the other
2 thought, I'm a big fan of reverse
3 engineering things. And I don't know if
4 this is what, you know, those who have
5 been tossing it around -- Amanda and
6 others -- who have been toying with.

7 But I just had a case recently,
8 marital rape case, and she recorded
9 interactions in between -- in the middle
10 of this, like there was a six-month old
11 baby in the room, there was a one-and-a-
12 half-year old -- the -- the tape is
13 chilling. It wasn't covered, obviously,
14 under the law. It became an issue
15 because she had recorded it -- I don't
16 think she realized she couldn't -- the
17 defense tried to stick some Richards
18 issues on with her.

19 But what's to say that we couldn't
20 start by doing something that -- you
21 know, if somebody goes to -- something's
22 happening, and they -- their reaction is
23 record it, allowing that to come into
24 evidence if the -- so for instance,
25 someday makes a report of DV or that rape



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1 case and -- I can't think of how many
2 times somebody has come in and said,
3 well, I have recordings, or I have
4 this -- because they don't realize. But
5 being able because they reported, because
6 you have corroboration, there's a report
7 going on, there's a case investigation.
8 The allowance of those recordings to be
9 utilized in conjunction with -- with the
10 nature of the case. I don't know if you
11 understand what I'm getting at.

12 It's almost like it -- it's not
13 supposed to happen, but if there -- if
14 they show that exigence, if they show
15 that -- their evidence of those crimes --
16 could something be crafted to allow them
17 on a case-by-case basis.

18 JUDGE HANTZ MARCONI: As opposed
19 to --

20 MS. LAFRANCE: And also --

21 MR. VICINANZO: I wonder --

22 JUDGE HANTZ MARCONI: --

23 (indiscernible) statute.

24 MS. LAFRANCE: I'm sorry; go ahead.

25 JUDGE HANTZ MARCONI: Oh, I was



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1 going to say as opposed to an amendment
2 to the statute, but a case-by-case
3 evidentiary-type -- well, you'd still
4 need a statute, but on a case-by-case
5 basis, rather than (indiscernible) --

6 INV. BERNIER: Right. Which
7 might --

8 JUDGE HANTZ MARCONI: -- broad
9 exemption.

10 INV. BERNIER: -- which might give
11 us something so that that, kind of, shuts
12 down people just taping things willy-
13 nilly. But it gives -- it gives us
14 something to start with, and then
15 something more encompassing could be
16 assessed and crafted from there.

17 MS. LAFRANCE: So it -- yeah, it
18 would be almost --

19 MR. VICINANZO: Yeah --

20 MS. LAFRANCE: -- the language would
21 be if it were, you know, in the process
22 or near the time of the commission of a
23 crime. Something like that, Kristyn? Is
24 that what you're saying?

25 INV. BERNIER: Yeah, essentially --



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1 like, and I'm thinking of this case --
2 this example. Where her only thought
3 process -- she didn't know what to do and
4 I think, you know, the first thing,
5 especially in the days of technology,
6 she -- there was, you know, there was a
7 little bit of time gap in between this.
8 He wasn't letting her out, but she was
9 able to hit record, and there's no
10 question that these things were going on.

11 Had we been able to -- had we had
12 something that could have allowed us to
13 assess that and utilize that, it would
14 absolutely have been helpful for the
15 case. And she was doing it for the right
16 reasons. She didn't know what to do,
17 there was a huge safety issue. But as it
18 stands now, you know, we're not.

19 So it would have to be commensurate,
20 I guess, with, you know, obviously -- it
21 would have to have -- be while it's going
22 on, at least to start.

23 MR. VICINANZO: Well, can --

24 MS. SEXTON: I would recommend that
25 we continue to have conversations about



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1 this. The process for bringing forward
2 legislation includes, you know, bringing
3 all stakeholders together and having
4 really lengthy discussions over a period
5 of time.

6 But I think it's appropriate for
7 this task force to make a recommendation
8 that there should be future discussions
9 and explorations about this issue in
10 addition to other statutory changes.

11 MR. VICINANZO: Well, to that end --
12 I -- I'm -- this is Dave Vicinanzo, and I
13 apologize, I don't have video access
14 today.

15 But I don't know this for sure, but
16 it seems to me that these laws -- the
17 two-party laws -- they tend to be a
18 feature of New England. I don't know how
19 broadly across the country they're
20 prohibited.

21 The feds have a one-party law. I
22 know in New York and New Jersey there's a
23 one-party law, you don't -- you don't
24 have this -- you're not criminalizing
25 tape recording somebody. I think most



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1 states allow it. What is it about New
2 England states and, you know, what --
3 what's the genesis of these laws to begin
4 with?

5 I wonder, you know, when tape
6 recording first became, you know, was
7 invented, you know, I can imagine they --
8 a group of the legislatures at the
9 type -- of the -- of the time
10 in the 1920s, you know, worried about not
11 having private conversations put on tape.

12 I mean, it seems to me it's
13 problematic that you can allow testimony
14 about what happened or what a person
15 heard, but you can't actually introduce
16 the best evidence, which is a tape. I
17 don't like the law; I think the law is
18 wrong.

19 But I wonder if -- if we could
20 explore what other states have
21 experienced. And especially in the area
22 of DV. I mean, is it common that one-
23 parties are admitted in, say, California
24 or Virginia? I don't know. I wonder.
25 And I wonder what the experience is there



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1 and whether or not there are any
2 negatives in addition to the possible
3 positives. It seems to me be it'd be
4 worth looking at that.

5 And also, I kind of feel like this
6 law is probably an anachronism. That's
7 my feeling. And it probably reflected
8 some of the prejudices and some of the
9 worries of the legislators in the 1920s
10 or '30s and maybe needs to be looked at
11 on that basis as well.

12 JUDGE HANTZ MARCONI: So it looks --

13 MS. LAFRANCE: And I just want to --

14 JUDGE HANTZ MARCONI:

15 (Indiscernible) --

16 MS. LAFRANCE: I want to point
17 out --

18 JUDGE HANTZ MARCONI: Go ahead.

19 Yeah.

20 MS. LAFRANCE: Sorry, Judge Hantz
21 Marconi. I just wanted to point out
22 too -- I mean, I'm assuming most people
23 are thinking of cell phone recordings,
24 but you have to remember too with
25 technology, there are -- you know, I



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1 have -- I know of a case where there were
2 recordings from the home security camera.

3 So -- you know, that trigger
4 automatically.

5 MR. VICINANZO: Yeah.

6 MS. LAFRANCE: That only starts when
7 somebody -- when, you know, it's a motion
8 detector. So you know, obviously, the
9 parties both know the recording -- the
10 recorder is there. They've consented to
11 it, presumably, right?

12 So I think in looking into this --
13 and Amanda, you're right -- I mean, we
14 make a recommendation. This is much more
15 than can be done in an hour's Zoom
16 conversation.

17 But we have to make sure that we're
18 forward-looking with respect to the
19 technology. I mean, who knows what's
20 going -- you know, what the technology is
21 going to be in two years, five years, ten
22 years. So I think it would behoove us to
23 be looking forward with that, too.

24 JUDGE HANTZ MARCONI: All right.

25 Anything else on that?



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1 MR. VICINANZO: Yeah.

2 JUDGE HANTZ MARCONI: Yes? No? All
3 right, what next? Judicial
4 accountability?

5 I can, sort of, set the table.

6 Current system, we've got the rolling --
7 every judge is reviewed with a survey
8 that was developed within the past decade
9 and half, two decades. Rolling basis,
10 once every three years, those surveys get
11 processed and reported. Judicial branch
12 does an annual report of collated
13 information, not the exact surveys
14 themselves. So there's that.

15 Of course there are reports to the
16 JCC. And there have been various
17 informal feedback loops, not so much so
18 recently. But further than that, what
19 ideas do people have?

20 INV. BERNIER: I think one of the
21 things that would be helpful is -- and I
22 can think of a number of glaring issues
23 we've had over the years. And some of it
24 usually is it's one or two judges that
25 have a propensity for some of these



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1 things. There's -- there's no place to
2 take that issue. When there's a ruling
3 that may not go along with the law, or
4 there's a question about the case law,
5 there's -- there's no annual review type
6 situation. There's no place to get --

7 JUDGE HANTZ MARCONI: You're talking
8 about --

9 INV. BERNIER: -- higher --

10 JUDGE HANTZ MARCONI: -you're
11 talking about --

12 INV. BERNIER: -- authority --

13 JUDGE HANTZ MARCONI: Yep. But
14 you're talking about beyond, for example,
15 a motion to reconsider and/or an appeal.

16 INV. BERNIER: Right. You know, or
17 some of those issues that come up about,
18 you know, a victim advocate being tossed
19 out of the court or a decision that comes
20 down -- and I've had it on non-DV cases
21 in terms of not getting a search warrant
22 signed because, you know, the particular
23 judge thought he saw somewhere that you
24 can't do X, Y, and Z but couldn't come up
25 with a cite for it. And as it turned

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1 out, it was inaccurate.

2 And you know, just being able to,
3 you know, double-check those things or --
4 or when an order is kind of blatant, that
5 there's a place to go and say, look, can
6 this be reviewed?

7 And the AG's office is extremely
8 limited. There -- there's not -- for the
9 longest time, we haven't gotten any --
10 any respite from going through the AG's
11 office when there have been issues with
12 bad orders.

13 JUDGE HANTZ MARCONI: How does that
14 work?

15 INV. BERNIER: And it's impacted a
16 lot of cases. Hmm?

17 JUDGE HANTZ MARCONI: How does that
18 work?

19 INV. BERNIER: I thought there was
20 a --

21 JUDGE HANTZ MARCONI: The AG
22 procedure. Because I'm not familiar with
23 it.

24 INV. BERNIER: I just remember one
25 of the -- we had a recent case where the

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1 prosecutor ended up calling the AG's
2 office. Because that was her -- and
3 she'd been a prosecutor forever. And
4 don't know -- even know who she called.
5 I don't know whether it was a -- that was
6 the understanding --

7 MR. ENDRES: I might be able to help
8 out with that. The attorney general's
9 office has a solicitor general now. So
10 there is an appeals process where if you
11 are interested in bringing a state's
12 appeal, there's a form you fill out. You
13 send it to the solicitor general. They
14 review the case and essentially issue you
15 a decision of whether or not that's an
16 appeal they're willing to take.

17 JUDGE HANTZ MARCONI: Okay.

18 MS. ZINKIN: So that would be a case
19 where --

20 JUDGE HANTZ MARCONI: The AG's
21 office isn't calling the court, it's a --
22 it's a process for appeal.

23 INV. BERNIER: Right.

24 MS. ZINKIN: It's a process for the
25 state to bring an appeal where the



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1 (indiscernible) --

2 MR. ENDRES: Correct.

3 INV. BERNIER: -- has prevailed.

4 MR. ENDRES: The difficulty, though,
5 is -- I mean, obviously, judges are
6 people, and a lot of them have certain
7 personalities.

8 And I think that you'll find there
9 are -- you know, you might find a judge
10 who doesn't like guns, or a judge who
11 doesn't like domestic violence, or a
12 judge who doesn't necessarily see a lot
13 of, sort of, power in victims of domestic
14 violence. And you'll get rulings that
15 maybe in your opinion are bad, but they
16 don't violate the law.

17 When a judge makes a finding that
18 somebody's not guilty, there's -- there's
19 nothing you can do about that. And I've
20 certainly had the experience in domestic
21 violence cases where the judge has found
22 the defendant not guilty and then
23 proceeded to lecture the victim on why
24 they shouldn't have, sort of, brought
25 this to the court to begin with.



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1 And there is nothing that I can
2 necessarily do as a prosecutor in that
3 position because the law hasn't been
4 violated, it doesn't necessarily violate
5 the judicial conduct rules. It's simply,
6 sort of, a bad decision. And I think
7 that's --

8 JUDGE HANTZ MARCONI: Well, the
9 decision -- I guess I'm hearing two
10 things. If it's a bad decision, I don't
11 know that there can or should be anything
12 other than our system sets forth the
13 opportunity for reconsideration and
14 appeal.

15 What raises my red flag is lecturing
16 a litigant in a failed case. For
17 example, when I was litigating, you win
18 some, you lose some -- fifty-one percent,
19 forty-nine percent, you're not there.
20 But lecturing a victim, I'm not sure
21 there's justification for that. But
22 that's a -- that's a different question
23 than a bad decision that is within the
24 bounds of the law.

25 INV. BERNIER: Um-hum.



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1 JUDGE HANTZ MARCONI: Does that make
2 sense?

3 MR. ENDRES: It does make sense.

4 But I think that they're somewhat
5 interrelated in the sense of --

6 INV. BERNIER: Um-hum.

7 MR. ENDRES: -- I understand I win
8 some and I lose some. But if I'm losing
9 a lot in front of a particular judge,
10 that may be concerning to me.

11 If -- for example, I had a domestic
12 violence case where the victim had
13 testified that this was her boyfriend.

14 She had testified that she was moving her
15 clothing out of the apartment. The
16 police had testified when they made
17 contact with him, he referred to the
18 victim as his girlfriend. And the court
19 found that I didn't prove there was an
20 intimate relationship. And when I read
21 the definition of intimate partners to
22 the court, the response I got was dating
23 can mean different things to different
24 people.

25 And that was something that occurred



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1 not just in a single case, but I found
2 happening in other cases as well, this
3 sort of -- I guess I didn't explicitly
4 ask if they were in a sexual
5 relationship. But I would think getting
6 in evidence that people are dating, are
7 boyfriend and girlfriend, share an
8 apartment, would certainly get over that
9 hump. And when you're getting those same
10 decisions from one or two particular
11 judges, I think that's troubling.

12 MS. ZINKIN: But is that something,
13 though, that you could have appealed if
14 wanted to? Because, you know, perhaps
15 the judge was misapplying the law of what
16 an intimate partner is.

17 MR. ENDRES: But the problem is that
18 as soon as the judge says not guilty,
19 it's not something the state can appeal
20 because jeopardy is attached --

21 MS. ZINKIN: Right.

22 MR. ENDRES: -- as soon as we
23 started the trial.

24 MS. ZINKIN: Right.

25 MR. ENDRES: So the AG's office

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1 won't even look at that, and there's no
2 aspect to appeal that.

3 MS. ZINKIN: Got it.

4 MR. ENDRES: So you're essentially
5 left shrugging your shoulders and saying,
6 well, that's a bad decision. And then --

7 JUDGE HANTZ MARCONI: So actually
8 you're drilling down to a set of cases
9 where there is no appeal.

10 MR. ENDRES: Right.

11 JUDGE HANTZ MARCONI: And so really
12 what you're looking at is perhaps -- I
13 don't know how I say this -- a -- where
14 there's an interpretation by a judge, no
15 avenue of appeal, but you have sort of a
16 consistent misinterpretation, what do you
17 do with that? In your view, if you have
18 a consistent misinterpretation, where do
19 you go?

20 INV. BERNIER: And --

21 MR. ENDRES: And I don't know if
22 there is anywhere you can go, is the
23 problem. And I've certainly -- and I
24 mean, it's not -- that's not something
25 that's limited to domestic violence



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1 cases.

2 I mean, there are -- there are
3 judges who find no one's ever driving
4 drunk. And there are judges that find
5 everyone's -- are driving drunk. And
6 that's just those judge's personalities.

7 So you -- you hope you're not in front of
8 one of those judges if you have a DWI
9 case, depending on what side you're on.

10 But it seems like if -- if there is
11 some level of consistency in terms you
12 win some, you lose some, I shouldn't be
13 consistently winning or consistently
14 losing.

15 INV. BERNIER: I liken it to the
16 concept for us in law enforcement because
17 we have rules and regulations for
18 everything. You can look at someone the
19 wrong way, and that can be a violation of
20 some rule or reg.

21 Implicit bias was a really big deal,
22 and I think that's part of it. And I --
23 it's not -- when Steve talks about you
24 get these one or two judges, you don't
25 have a judge that, you know, it -- that

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1 will, you know -- occasionally everybody
2 makes an error in judgment. But you'll
3 have consistently that particular judge
4 will have a certain bias or perception on
5 particular cases.

6 Child sexual assault images were a
7 really big problem because a number of
8 judges -- old-school judges -- when we
9 started ICAC cases, didn't see it as --
10 they saw it as a victimless crime because
11 there was no understanding. So it was
12 like a -- it's not bad. It's not like a
13 hands-on offense. You see it with
14 judges. I've had, you know, old judges
15 in the past who would be, like, you know,
16 what goes behind closed doors stays
17 behind closed doors.

18 But when you have these types of
19 decisions -- like Steve's talking
20 about -- you can pin it down to the
21 specific judges because it kind of
22 filters through a lot of the stuff that
23 they do. And there is no recourse for
24 that. When you have a judge put in an
25 order you know what, I'm going to buy the

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1 fact that this was self-defense. Next
2 time, don't put your hands around their
3 neck kind of thing. And it was a
4 strangulation case. Well -- or you know
5 what, you know, it's almost sexual
6 assault. Next time, don't do this.

7 Because it -- you're really walking the
8 fine line. That's -- that's problematic.
9 And it's not just a decision here or
10 there, it's consistent in that particular
11 courtroom --

12 JUDGE HANTZ MARCONI: It's
13 interesting --

14 INV. BERNIER: -- for these cases.

15 JUDGE HANTZ MARCONI: -- because I'm
16 hearing that in the domestic violence on
17 the civil side, you would have a remedy
18 or at least some recourse. You would
19 have a motion to reconsider, you would
20 have an appeal issue. But you don't have
21 that on the criminal side.

22 MS. KRUEGER: I would just say on
23 the civil side that is -- that is true,
24 right? You have the opportunity to
25 appeal. It's certainly a more difficult



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1 appeal if it's an unsustainable exercise
2 of discretion, right? And -- which it
3 may be when you're talking about, like, a
4 continuum of how a judge may interpret
5 certain facts. So I would --

6 JUDGE HANTZ MARCONI: Right. You
7 might have -- I mean, the fact of the
8 relationship stands on different footing
9 than other, I'll say, more discretionary
10 decisions about timing, duration, those
11 sorts of things.

12 MS. KRUEGER: Right. And then
13 there's credibility. And that, you
14 know -- you know -- and if there's a --
15 if there's a particular judge who seems
16 to have more skepticism towards people
17 who are coming forward as victims, and
18 you see that on a regular basis, that's a
19 harder thing because it will appear in an
20 order. Even if an order's, you know, may
21 just be a check box thing. But if
22 there's a merit that accompanies it and
23 there's any mention of credibility, you
24 know -- you really -- that's not worth
25 appealing, right?

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1 So -- but the other point of that is
2 if a protection order's denied -- and I
3 found that this was in the report -- why
4 don't more plaintiffs appeal their cases.
5 Well, if there's no protection order in
6 place, you know, ninety percent of the
7 time the victim is not going to appeal
8 that for a variety of reasons, safety
9 being one. And so that is a real barrier
10 for victims in particular in deciding --
11 even it if it's an obvious legal error --
12 to move forward with an appeal. So I
13 just want to point that out.

14 JUDGE HANTZ MARCONI: Right. And so
15 it's interesting because those are the
16 cases that could affect the law, if you
17 will. And so maybe the challenge is -- I
18 mean, again, thinking big -- but how do
19 you provide that additional resource to
20 allow for appeals?

21 JUDGE YAZINSKI: The thoughts I had
22 in that regard --

23 JUDGE HANTZ MARCONI:
24 (Indiscernible) throughout. So yeah. Go
25 ahead.



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1 JUDGE YAZINSKI: One of the things
2 that I thought about in this regard over
3 the last few weeks is amending the
4 statute -- when we get around to the
5 statute -- to provide for an appeal that
6 stays the existing temporary order and
7 also is expedited much the way we
8 expedite abuse and neglect appeals.

9 Because I agree with Mary that it is
10 extraordinarily intimidating both to lose
11 and then to have to turn around and file
12 an appeal that might not get heard for a
13 year while you have no protection.

14 But if we recognize that these
15 appeals are extraordinarily important and
16 hearing them timely is important, now
17 going the line of the abuse and neglect
18 system where appeals get heard quickly
19 might be something to look at.

20 JUDGE HANTZ MARCONI: And
21 particularly if it stays the temporary
22 order or keeps the temporary order in
23 place.

24 INV. BERNIER: In addition to that,
25 even in -- I mean, like -- again, a lot

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1 of us, we all have oversight. We all
2 have an immediate supervisors. We all
3 have that layer of -- I call it the food
4 chain. Even if there was, you know, a
5 denial that there some type of an
6 automatic -- kind of like NFL does with
7 touchdowns and everything under the two-
8 minute warning, you know. And call New
9 York and have them take a look at the
10 video type of thing.

11 If there's a denial, having
12 something set up so that there is a quick
13 ability to review -- with exactly what
14 the judge just said now -- and having
15 that time frame, you know -- keeping the
16 order as-is until that little review
17 process happened might be something to
18 consider.

19 JUDGE HANTZ MARCONI:

20 (Indiscernible) -- general kind of
21 thing --

22 MS. LAFRANCE: Yeah. Here's --
23 here's my thought on that. Kristyn,
24 that's a great idea. Why couldn't it be
25 akin to something like sentence review

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1 for felony sentences?

2 You have a panel of three judges
3 that hears -- right? I mean, Merrill,
4 you're very familiar with this.

5 You know, it would be reviewable
6 by -- it could either be three district
7 court, family court, judges or even
8 superior court judges like sentence
9 review is now. And if, you know, two out
10 of three of those judges feel that the
11 denial was incorrect, then the
12 restraining order gets reinstated.

13 JUDGE HANTZ MARCONI: Interesting.

14 INV. BERNIER: And not even -- but
15 not even necessarily to that extent where
16 you're tying up three other people but
17 just that one level of -- even if there
18 was, you know, each area, county, or
19 however it works is someone's earmarked
20 to just review those. It wouldn't
21 necessarily need to be a two out of a
22 three.

23 Just getting that, kind of, second
24 opinion kind of thing. You know, just
25 like we all do when -- you know, if I do

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1 an arrest warrant or search warrant,
2 somebody's putting eyes on it. Did I
3 miss anything? And I think that would
4 really, potentially, cut down on a -- on
5 a lot of problems or prevent something
6 from happening. By just that other set
7 of eyes.

8 MS. ZINKIN: I just wanted to let
9 people know that appeals of DV orders and
10 appeals of civil stalking orders are
11 expedited already.

12 JUDGE HANTZ MARCONI: There's
13 expedited and then there's expedited,
14 right?

15 MS. ZINKIN: Tim just came to my
16 office. So according to -- Tim Gudas,
17 our clerk of court, they're expedited.

18 JUDGE HANTZ MARCONI: And I will
19 just tell everyone here that even though
20 we expedite, that has a meaning in our
21 process that may not be what y'all are
22 thinking of. So yes. But Tim is right;
23 they are expedited. But we may need to
24 put our running shoes on.

25 MS. LAFRANCE: But the issue with --



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1 JUDGE HANTZ MARCONI: --

2 (indiscernible) --

3 MS. LAFRANCE: The issue with
4 appeals, though, is they are so
5 expensive, and they are so time
6 consuming. That's the reason why they
7 don't appeal, because they don't have the
8 money.

9 JUDGE HANTZ MARCONI: Right. And
10 then you're getting in to appointed
11 counsel for that or the appellate DOVE
12 program.

13 INV. BERNIER: But I think you're
14 also -- people that probably don't even
15 realize they can appeal it.

16 JUDGE HANTZ MARCONI: Right.

17 INV. BERNIER: You know, we're in
18 the system all the time, and there's
19 stuff that I'm learning thirty years in,
20 and I'm still learning things. And for
21 somebody to walk into the system -- you
22 know, I grew up if a judges say X, the
23 judge means X, and that's -- that's the
24 truth. And that's, you know, that's I
25 think a lot of the perception. So --



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1 MS. ZINKIN: Although the notice of
2 order should tell them specifically that
3 they have the right to appeal, so --

4 JUDGE HANTZ MARCONI: Yeah but --

5 INV. BERNIER: People don't read
6 things --

7 JUDGE HANTZ MARCONI: -- again,
8 there's paperwork. Yeah, there's
9 paperwork, and then there's paperwork.
10 And how many people here read their
11 mortgage document or their lease. I
12 mean, their car, you know -- purchase a
13 car, who reads those papers? Nobody. So
14 yeah. It is true people know they can
15 appeal, but I think the reality is the
16 system is not conducive to people really
17 knowing how to do that.

18 MS. ZINKIN: Other than sentence
19 review, is there any other, kind of,
20 system that we have where there's some
21 kind of, short of an appeal, review of a
22 trial court's decision?

23 MR. ENDRES: Absolutely. In bail,
24 if a bailiff commissioner makes a
25 decision, there's a statutory right to



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1 appeal it to a circuit court judge. And
2 if you don't like the circuit court
3 judge's ruling, there's a statutory
4 appeal to superior court. And usually, I
5 think it's within thirty-six hours by
6 statute. So --

7 MS. ZINKIN: So would this require
8 statutory amendment, you think?

9 MR. ENDRES: It absolutely it would
10 require a statutory amendment to do
11 either an appeal to superior court or
12 even, I think, a sentence-review-type
13 thing with a three-judge panel. I think
14 all that would require a legislative
15 amendments that -- and I mean, obviously,
16 we're a judicial task force.

17 I think that the -- the judicial
18 branch could come up with some type of
19 oversight over sitting judges that are
20 currently sitting without any legislative
21 input, but that would require, I think, a
22 lot of thought by the part of the
23 judiciary.

24 JUDGE HANTZ MARCONI: Well, the
25 judicial branch can review -- there's

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1 some things we can review and some things
2 we can't review. And -- or let me put it
3 this way, there's a process for reviewing
4 individual decisions that we can't undo
5 without modifying that process though the
6 legislature because they give us -- they
7 grant us our jurisdiction, except for
8 certain inherent jurisdiction, which we
9 have.

10 There are also -- and I think the
11 protocols are an attempt to deal with
12 that process issue, which is very much
13 within the wheelhouse of the judicial
14 branch. But the judges being
15 constitutional officers appointed by the
16 governor, approved by the council,
17 they're all their own authority, if you
18 will, within the confines of the branch
19 review process. So some yes, and I think
20 I'm anticipating -- but we're going to
21 look into it -- some yes, and some no.

22 INV. BERNIER: With regard to some
23 of the -- with reviews -- and now I think
24 a lot of it is because judges are wearing
25 multiple hats because they're doing



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1 civil, they're doing juvie, they're doing
2 DV, they're doing criminal. You have a
3 huge caseload, people filing paperwork
4 for X, Y, and Z.

5 Some of the stuff that we might be
6 looking for -- which again, might be just
7 another set of eyes built into the
8 system -- we're seeing also more and more
9 taking things under advisement. So I've
10 seen, you know, final DV orders being
11 taken under advisement. And I don't know
12 the, you know, the legal ins and outs of
13 how long that -- but obviously the order
14 stays in place until the order comes down
15 for a petition. But that could all --

16 I've seen that also in criminal
17 cases. So you have a judge who'll go,
18 okay, you know, I need to go back and
19 review. I've seen it on PC hearings,
20 I've seen it on anything. I want to go
21 back, and I want to double check and look
22 things up. That maybe the point for that
23 second set of eyes on some of those
24 things so that you don't end up with
25 legislative changes. You don't end up



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1 with appeals.

2 A lot of judges are taking things
3 under advisement now anyway. Something
4 that might be instituted that isn't going
5 to mess around with Constitutional rights
6 and due process and all that other legal
7 stuff that I don't have a law degree to
8 discuss.

9 JUDGE HANTZ MARCONI: Well, and it
10 may be you're right. There may be a
11 point of collaboration that could be
12 built into the system. I don't know.

13 MS. SEXTON: But if there are
14 consistent complaints against specific
15 judges relative to their conduct in
16 domestic violence-related cases, the
17 courts can remove them from domestic
18 violence -- sitting on domestic violence
19 cases. Is that correct?

20 MS. ZINKIN: I don't think so.

21 JUDGE HANTZ MARCONI: I don't know.

22 MS. ZINKIN: They're circuit court
23 judges.

24 JUDGE HANTZ MARCONI: I don't think
25 so.

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1 MS. ZINKIN: I think by statute I
2 have to hear all the cases that come up
3 at the circuit court.

4 MS. SEXTON: I think we should look
5 into that.

6 MS. ZINKIN: And the circuit court
7 is a statutory court, it only has
8 jurisdiction as granted to it by the
9 legislature.

10 MS. SEXTON: But there are other
11 matters within the circuit court that
12 the -- that judge could be sitting on.

13 JUDGE HANTZ MARCONI: Sure.

14 MS. SEXTON: I think it's something
15 with should look into.

16 MS. ZINKIN: Um-hum.

17 JUDGE HANTZ MARCONI: And also the
18 process for vetting and collecting those
19 reported incidents, you know. You've got
20 to be able to understand the context. It
21 gets unwieldy -- and I'm just
22 speculating -- but you have to understand
23 the context to understand the impact to
24 the parties and the behavior you're
25 talking about.



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1 So that is a -- I don't know about
2 removal, I think that could be invading
3 some level of authority, but it's worth
4 looking at.

5 INV. BERNIER: But if some of those
6 issues -- and again, in my personal
7 experience, and others are different -- I
8 can narrow it down to, you know, a couple
9 judges here and there that have specific
10 things that they do and don't do or
11 specific beliefs.

12 If those -- if there is an avenue to
13 address that stuff, to either head it
14 off -- either with training or review or
15 whatever it is -- it doesn't end up
16 rising to the level of removing a judge
17 from something. It's about nipping it in
18 the bud, so to speak, and having the
19 avenue to address those things. And --

20 JUDGE HANTZ MARCONI: So what do we
21 think about --

22 INV. BERNIER: -- no -- again, no
23 different than you do in my position --
24 my profession.

25 JUDGE HANTZ MARCONI: What do we

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1 think about the avenue to address it? A
2 type of -- not a survey once every couple
3 of years, but a type of feedback, comment
4 line, complaint form, what are we
5 thinking about?

6 MS. BEAUCHAMP: Is there maybe an
7 opportunity here to create some sort of
8 maybe short evaluation form for victims,
9 advocates, attorneys who are assisting
10 victims, to just evaluate their
11 experience with obtaining or applying for
12 a temporary order? And then perhaps
13 another form for the final order hearing.

14 Something that maybe just addresses,
15 like, walking into the court and, you
16 know, having a helpful clerk assist you
17 with deciding which is the right
18 petition. Did you -- were you given a
19 private space to complete your petition?
20 What was the experience like in the
21 courtroom? Just something, and then, you
22 know, some sort of procedure to collect
23 this information and document it.

24 I think early on someone had
25 discussed the importance of data, and it



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1 really is important. I think that kind
2 of goes along the lines of having a
3 petition that has some fillable formats
4 that we can actually pull the information
5 out of and it's meaningful information.
6 And it's not just whether the order was
7 granted or not, but you know, was there a
8 firearm issue? Were children -- was
9 there a request for, you know, something
10 related to the children in it? I just
11 think this information would help us to
12 track going forward.

13 I mean, we've heard anecdotally what
14 the issues are and the concerns, but if
15 there were a mechanism to actually
16 collect the data and then support the
17 fact that, yes, we need more training for
18 judges. We need more training for the
19 staff in the court.

20 JUDGE HANTZ MARCONI: That would
21 work, I think. I like the idea. Sort of
22 an exit interview on leaving the
23 courthouse.

24 If there's an advocate, I suspect
25 you would get a response. I don't know



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1 if we would capture all the self-
2 represented parties who are going to
3 leave and either give up or not or go
4 about their business, but it's a start.
5 And I think it's a -- sounds like an
6 interesting way to collect more
7 information.

8 INV. BERNIER: On a different note
9 with regard to, say, that specific
10 potentially hair-raising order -- and
11 I -- I have a greatest -- I call it my
12 greatest hits compilation of a number of
13 these. But say a judge orders, you know,
14 a felony bail hearing for the defendant,
15 puts in the order something to the effect
16 of and I recommend that the -- I don't
17 want to break up this couple -- and I
18 recommend that the victim, you know,
19 might want counselling. I -- that -- I
20 lose my mind when I see stuff like that.

21 Or an order that -- just the
22 verbiage or the decision -- where would
23 one go to have that looked at? That's
24 the other avenue, you know. Something
25 comes down, is there a, you know -- I

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1 know I can pick up a phone and
2 commiserate with someone else about it.

3 But if there's something that, you know,
4 that doesn't belong in a bail order, so
5 where does one go with that? That's
6 another avenue that isn't accessible.

7 JUDGE HANTZ MARCONI: So the state
8 wouldn't -- and again, you're in -- I'm
9 sort of trying to test this out -- the
10 state wouldn't then say, wait a minute,
11 Your Honor, that's not appropriate for
12 the bail order. Would you reconsider and
13 drop that? And here are all the reasons
14 why it's not appropriate.

15 INV. BERNIER: But for instance,
16 where -- is there a place to do that now?
17 And is that something that we can --
18 because for all these years that I've
19 been doing it, I couldn't tell you where
20 I would pick up the phone and go, hey, I
21 have a problem with an order here. Other
22 than calling other colleagues or
23 prosecutors or, you know, advocates and
24 going, what do we do as a group and who
25 do we take this to.



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1 JUDGE HANTZ MARCONI: Steve --

2 Steve --

3 INV. BERNIER: That's been a real
4 frustration.

5 JUDGE HANTZ MARCONI: Steve, tell
6 me, if you get a bail order is there a
7 reconsideration opportunity?

8 MR. ENDRES: Yeah, you could
9 certainly file a motion to reconsider a
10 bail order like that.

11 JUDGE HANTZ MARCONI: Right.

12 MR. ENDRES: And depending which
13 court issued the order, if it was issued
14 out of a circuit court, you could appeal
15 that to the superior court, again, for
16 that hearing within thirty-six hours.

17 JUDGE HANTZ MARCONI: Right.

18 MR. ENDRES: The state and the
19 defense have that right to appeal. And
20 you can appeal bail orders to the Supreme
21 Court, and the statute says they shall be
22 determined promptly. Which, again, I
23 think promptly in Supreme Court terms
24 means within, like, three months, as
25 opposed to within thirty-six hours.



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1 JUDGE HANTZ MARCONI:

2 (Indiscernible).

3 MR. ENDRES: There is certainly a
4 right to appeal bail orders.

5 JUDGE HANTZ MARCONI: Right. And so
6 if there was a bail order that was
7 inappropriate with respect to the
8 complaining witness, you would be able to
9 deal with that through that process?

10 MR. ENDRES: There is an avenue of
11 appeal for bail orders.

12 JUDGE HANTZ MARCONI: Right. It
13 would just be a priority in terms of
14 resources whether you're going to
15 basically bother with that, right?

16 INV. BERNIER: Exactly. There's
17 no --

18 MR. ENDRES: Well, again, the county
19 attorneys can't bring appeals, they all
20 have to go through the attorney general's
21 office. So --

22 JUDGE HANTZ MARCONI: Right.

23 MR. ENDRES: -- you'd have to get
24 the attorney general's office to be on
25 board with that.



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1 JUDGE HANTZ MARCONI: Yep.

2 MS. KRUEGER: But the question is --

3 MS. HORNICK: But the point is,

4 though -- go ahead.

5 MS. FREEMAN: Those type of concerns

6 do get brought to the domestic violence

7 program manager, and that can help inform

8 what types of training is done for staff

9 and judges. So that's another avenue if

10 the end goal in that particular case is

11 to try to get information to be geared

12 towards training, that is the avenue to

13 get that information to the judicial

14 branch.

15 JUDGE HANTZ MARCONI: And that's

16 currently --

17 MR. ENDRES: Well --

18 JUDGE HANTZ MARCONI: -- that

19 currently goes to Jean through the -- her

20 phone, her email, through her contact

21 information, so anybody -- maybe we have

22 to publicize this more -- can route that

23 information through the DV program

24 manager for it to be addressed by the

25 circuit court, if you will.



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1 MS. FREEMAN: That's accurate.

2 MR. ENDRES: Well --

3 MS. HORNICK: Kristyn was talking
4 about felony bail, though; weren't you,
5 Kristyn? So the limited number of
6 superior court judges? Wasn't that --

7 INV. BERNIER: That was -- that
8 particular case was felony. And again,
9 same type -- same judge that we had a
10 number of those issues with. But that
11 was just one. I have a bunch of
12 examples. But that's an example of one
13 of those, like, A, it shouldn't be there;
14 it's not the appropriate place for it.

15 The attitude of I don't want to break up
16 the marriage type of thing with a
17 strangulation case, and a defendant
18 that's, you know, fifteen years older
19 than his nineteen-year-old victim.

20 What's the avenue?

21 The kid who's the victim isn't
22 certainly going to push for it.
23 Everybody's judges are tied up and
24 prosecutors are tied up. And there's
25 just no place to take that but to stick

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1 in a file of here we go again. And have
2 it addressed in some way.

3 MS. HORNICK: I would just -- if
4 it's a -- I mean, superior court's a
5 whole different story. It feels like
6 there's a, you know, a -- I mean, with
7 all due respect to all of these people,
8 all these stakeholders that we're talking
9 about -- yeah, shoot.

10 I think when you get into superior
11 courts since it's such a limited -- I
12 mean, there's -- there's motions to
13 reconsiders, there's records to be
14 created, there's more witnesses to be
15 called.

16 So I don't -- I mean, again, you
17 might be talking about the lack of the
18 oversight or accountability, that I don't
19 know -- I don't know -- that is -- seems
20 to be an issue, kind of, across the
21 board.

22 But gosh, I also -- this is going to
23 sound weird, but I don't -- I've had
24 many -- not many -- several calls and
25 complaints from law enforcement and

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1 others about judge's orders. Not just in
2 the county where I am -- Grafton
3 County -- but, you know, across the
4 state. And I've wondered about, sort of,
5 oversight and accountability. Because it
6 seems like a real necessity across the
7 board.

8 But I also don't want to paint this
9 broad brush that all judges are bad.
10 It's just that there isn't any -- it
11 doesn't seem like there's any way to hold
12 any judges --

13 INV. BERNIER: Exactly.

14 MS. HORNICK: And I mean -- so I
15 don't know what the answer is, Justice
16 Marconi, but at -- but it does seem like
17 there's -- there's that piece somehow
18 that's, kind of, calling
19 (indiscernible) --

20 JUDGE HANTZ MARCONI: Do people not
21 credit or not pay attention to or not
22 participate in the every-three-year
23 review? I mean, is that just something

24 MS. SEXTON: No, it's --

25 JUDGE HANTZ MARCONI: -- that nobody



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1 pays attention to except the judges who
2 are --

3 MS. SEXTON: Yeah, it's not highly
4 publicized. I don't think there's an
5 effort to really seek input.

6 But I also think there's a lack of
7 understanding about what that entails.

8 You know, are there -- is there -- are
9 there -- is there data collected on each
10 judge in order to be able to compare --
11 like for instance, temporary orders,
12 relinquishment of a firearm is optional.
13 Most judges will order relinquishment.

14 Is there some sort of data that's
15 collected to determine how often judges
16 are or are not doing that.

17 Is there some sort of basic
18 performance measures in order to, you
19 know, have, sort of, an objective look at
20 performance in addition to trying solicit
21 input from, you know, parties and other
22 people who are working within the system.

23 So I'm not even sure what that looks
24 like. Is there --

25 JUDGE HANTZ MARCONI: Well, it's

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1 interesting because I think the survey
2 that was -- I mean, certainly the survey
3 that was developed way back when was
4 dealing with performance of judging in
5 general.

6 I don't think at this point there's
7 been any data collection in terms of
8 outcomes, which could be -- I'm only,
9 again, kind of, thinking ahead -- but
10 drawing -- there's correlation and then
11 there's causation. And drawing
12 conclusions from outcomes with all --
13 it'd be an interesting process because
14 you look at what types of cases happen
15 before a certain judge, who the parties
16 are, what the evidence is, before you
17 start drawing -- drawing conclusions from
18 sheer data.

19 So that, to me, would be -- it's
20 like any survey. You'd have to control
21 for many variables. But I don't think at
22 that point this -- that sort of data
23 tying outcomes to specific judges or
24 geographic locations or anything else has
25 been done.



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1 JUDGE CARBON: So Justice Marconi, I
2 don't think that we -- with the judicial
3 surveys that go out, you know, maybe an
4 idea is to disseminate it more broadly.
5 It does go in Bar News, and I don't know
6 where else it's publicized --

7 JUDGE HANTZ MARCONI: Right.

8 JUDGE CARBON: -- but the intent is
9 to capture perceptions.

10 JUDGE HANTZ MARCONI: Yes.

11 JUDGE CARBON: And they do break it
12 down by category.

13 JUDGE HANTZ MARCONI: Yes.

14 JUDGE CARBON: What it does not
15 do -- and what I'm not sure would be
16 appropriate to do -- is to say, did this
17 judge exercise his or her discretion to
18 take firearms or not, when it's within
19 the purview of the law to do it or not do
20 it, depending on the facts of a case.

21 JUDGE HANTZ MARCONI: Right.

22 JUDGE CARBON: And there's no survey
23 that you're going to get into that's
24 going to try to disaggregate that kind of
25 information. But what I do think --



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1 JUDGE HANTZ MARCONI: Right.

2 MS. SEXTON: Well, if you want to
3 fight bias --

4 JUDGE CARBON: Oh, excuse me. Let
5 me finish, if I may.

6 JUDGE HANTZ MARCONI: Yes.

7 JUDGE CARBON: Couple of things that
8 we could do here. We did do surveys way
9 back at the family division, and so
10 there's a model and a template for doing
11 public surveys there.

12 Another suggestion might be that we
13 look at a court watcher program that lots
14 of jurisdictions around the country have.
15 They monitor not only judicial conduct
16 but clerks, law enforcement, advocates,
17 everybody within the context of the
18 courtroom. So it's an observation
19 process on how the collective entire
20 system is working. So that's something
21 to look at.

22 This also gets to an issue that
23 Kristyn raised in her email that I don't
24 want us to lose before we close today,
25 which is firearms. And that's a whole



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1 big range of different issues about the
2 statute, about how orders are served,
3 what the forms contain in terms of
4 information that we gather from victims,
5 when they apply. Do they necessarily all
6 want their firearms to be surrendered.
7 Lots of states don't have an automatic,
8 kind of, provision in their form. We
9 happen to. And so they, you know -- we
10 can check it or not check it. We have
11 the ability to take them depending on the
12 facts of a case.

13 We don't have provisions built in
14 for a return of service to track what
15 firearms were identified. We don't ask
16 that specific detail in any kind of a
17 form. You know, when asking victims if
18 they want firearms surrendered and if
19 they can identify them, great, but we
20 don't give them a tool that -- there are
21 organizations that have tools that would
22 help them identify what they are.

23 We don't track which ones were
24 surrendered, which ones weren't
25 surrendered. There's a whole bunch of



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1 information around that and a safer
2 service of process (indiscernible)
3 process and return back to the court that
4 we could be doing.

5 There's lots of -- you know, we
6 don't have time to get into the whole
7 myriad issues that surround firearms.
8 But there's a lot that could be done
9 through the courts, through law
10 enforcement, through advocates, and I
11 would suggest that that get put in our
12 bucket, too -- the addressing.

13 INV. BERNIER: And dovetailing on
14 what Judge Carbon said, this is another
15 one of those issues. That it's not just
16 about -- yes, our focus is judicial
17 system, but at every level there is an
18 opportunity for things to fall through
19 the cracks.

20 So a judge orders weapons to be
21 seized, you've got a plaintiff who may
22 put the information about exactly
23 where -- Missy Charbonneau's a perfect
24 example -- where those weapons are. And
25 the judge is doing their thing, the



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1 victim gave the information, and then it
2 falls apart at another level. So when
3 we're looking at some of these issues, we
4 really need to be looking at how they all
5 interplay because the work has to be
6 done, kind of, across the board.

7 And this is one of those things
8 where no matter -- you know, you go to
9 different counties, you could look at
10 different agencies, different levels of
11 training. You know, certain agencies
12 that may serve something that isn't the
13 agency that actually has the case. It's
14 kind of terrifying when you see what
15 actually goes on and what doesn't -- what
16 should be going on and -- in regard to
17 those weapons issues.

18 JUDGE CARBON: Just even to add to
19 that, if I could, we have situations
20 where a victim may identify a particular
21 firearm because that may be the only one
22 she knows about. So law enforcement may
23 take that gun, how do we know that the
24 defendant doesn't have a bunch of other
25 ones if we don't have a system for

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1 inquiring and then following up.

2 And what happens if they don't
3 surrender them? What's our follow-up?

4 What if they give them to third parties?
5 I mean, there's so many different issues
6 that we really could peel down on and I
7 think as a whole do a more responsible
8 job to make communities safer.

9 MS. SEXTON: But I think in terms of
10 the judiciary, if a particular judge
11 sixty percent of the time is not checking
12 the box to relinquish a firearm in
13 temporary orders -- and I'm not saying
14 that's the case -- but we should know
15 that. Especially when it comes to the
16 point of the three-year review. And I
17 think there just needs to be objective
18 data in order to determine that we're on
19 the right track.

20 JUDGE HANTZ MARCONI: But how do you
21 draw a conclusion from that sixty
22 percent?

23 MS. SEXTON: You review it. You
24 have to spend time reviewing it. So if
25 it's an actual three-year review, you use

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1 objective measures and you take the time
2 to look at if one judge is sixty percent
3 and the rest are ten percent, then that's
4 going to give you an indication that
5 that's something you need to delve deeper
6 into. And maybe it's a fluke. But it's
7 absolutely worth looking into.

8 JUDGE HANTZ MARCONI: Anything else?

9 On any topic?

10 INV. BERNIER: I think it'd be
11 really -- you know, again, coming from
12 the law enforcement side of things. Some
13 of these things -- for instance, the
14 firearms, the -- you know, service --
15 there's some really good opportunities
16 for -- I don't know if training's the
17 right word, yeah, training comes into
18 play -- but some interactive things where
19 you have prosecutors and judges and cops
20 and advocates kind of learning at the
21 same table. Not just judges being
22 trained in, you know, in their thing and
23 cops being trained in their little world,
24 but the perspective is something that we
25 all need to be cognizant of.

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1 Is -- I know what my perspective is
2 and I have to keep, you know, that To
3 Kill a Mockingbird thing where I have to
4 keep in mind where the prosecutor's
5 coming from, or where a judge is coming
6 from. And I think some of the
7 understanding of the limitations involved
8 in those trainings -- if a judge knows,
9 okay, I'm ordering you to seize the
10 weapons, from our angle, what are the
11 hurdles for the cop that's serving it if
12 the guy says, I don't have any weapons.
13 The victim put that on the form. What
14 are the avenues for us to take that? And
15 training people together in that topic --
16 and maybe other topics -- would be
17 helpful.

18 But you know, meaningful,
19 substantive training, not, you know,
20 frou-frou, kind of, kumbaya stuff where,
21 you know, people aren't paying attention.
22 But stuff where it could be -- I'm not
23 saying scenario-based -- but something
24 where you have people having to interact
25 and kind of spitball in terms of what

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1 they'll do and how they'll handle things
2 as things come up. But I think it's key
3 that we interact.

4 JUDGE HANTZ MARCONI: Makes sense.

5 Anyone have -- before we run out of
6 time -- anyone have any thoughts on
7 offenders using the judicial system to
8 further harass and control victims?

12 Unfortunately, when you get a no-
13 contact order, there's a lot of people
14 who immediately think, I need an
15 exception to that no-contact order so
16 that we can discuss the kids or the
17 finances, or we can discuss this or we
18 can discuss that.

19 And if you're the victim of domestic
20 violence and you've gone to the court to
21 get a protective order to keep this
22 person away from you, and then there's an
23 immediate exception to discuss the kids,
24 I think that's very intimidating.
25 Because it shows that this isn't really a

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1 no-contact order, that you -- the court
2 can't keep us apart type thing.

3 And certainly a lot of those
4 exceptions -- for example, one of the
5 common ones is they're allowed to have
6 contact to talk about the children. And
7 certainly we've had cases where when
8 someone says, you're a horrible mother,
9 they might be talking about the children
10 there, but that -- that's -- begins to
11 cross a line in becoming abusive again.

12 The other thing that we see a lot --
13 and we were talking earlier about the --
14 essentially recording people -- is we
15 periodically get motions -- Richards
16 motions -- essentially not to bring
17 evidence from the defense in on a
18 criminal trial, not to say, I want to
19 call this witness who has a Fifth
20 Amendment issue, but we see Richards
21 motions more to keep evidence out of our
22 trials.

23 INV. BERNIER: Yes.

24 MR. ENDRES: Where defense is filing
25 a motion saying, you can can't call the

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1 victim because the victim has a Fifth
2 Amendment right.

3 INV. BERNIER: Yes.

4 MR. ENDRES: And what's difficult is
5 that the courts tend to respond to these
6 motions by immediately appointing counsel
7 for the victim.

8 So you have this scenario where the
9 defendant is saying to the victim, if you
10 talk to the police, you're going to get
11 charged with a felony for recording me.
12 And the court almost gives credence to
13 that threat by immediately appointing
14 counsel for the victim without speaking
15 to the victim first.

16 So we have a lot of, you know, sort
17 of, intimidation that's built in within
18 in the acceptable range of doing things
19 as a defense attorney or as a litigant.

20 And I'm not sure what you can do to
21 prevent that, but I think it's certainly
22 something to be cognizant of that all of
23 these exceptions to protective orders,
24 all of these, you know, Richards hearings
25 where people are immediately getting



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1 appointed counsel, it's an extremely
2 intimidating process to begin with. And
3 being told, oh, you're going to go to
4 jail now. And then next thing you know,
5 you have an attorney appointed to
6 represent you, you got to be terrified.

7 INV. BERNIER: That's one example --

8 MS. HORNICK: The tension -- the
9 tension between the Constitutional
10 rights -- right -- of the defendant and
11 the victim' rights. And we -- just as
12 you so clearly elaborated, Steve -- we
13 see that so regularly becoming a constant
14 tool to try to get out of accountability.

15 MS. KRUEGER: It's coming up more in
16 civil cases now. The defense bar is
17 really pushing the Richards issues, and
18 it's just all about the intimidation
19 factor.

20 INV. BERNIER: Um-hum.

21 MS. KRUEGER: And you know, I mean,
22 I can't fault defense attorneys claiming
23 a defense, right? But I don't know when
24 you start -- if the judge is there seeing
25 this -- it's just interesting. I don't

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1 know what the right answer is to that,
2 but it certainly -- it just does seem
3 obvious that that's what's going on.

4 JUDGE HANTZ MARCONI:

5 (Indiscernible) --

6 MR. ENDRES: Especially when --

7 JUDGE HANTZ MARCONI: Go ahead.

8 MR. ENDRES: I'm sorry. Especially
9 when you're seeing motions that are
10 grounded on the victim has a Fifth
11 Amendment right because I read this in
12 the police report, meaning the state's
13 been fully aware of this information for
14 maybe a whole year and we haven't brought
15 any charges against the victim, and now
16 defense counsel is saying, oh, but they
17 can be charge with. And some of the
18 charges they come up with in the Richards
19 motions are, you know -- to use the term
20 frivolous and fanciful certainly hits the
21 nail on the head.

22 I agree with Patricia with -- under
23 the wiretap statute, if you have your
24 phone out and you say, I'm recording you,
25 there is no crime there. But we'll have



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1 defense attorneys filing motions saying,
2 no, not only is there a crime there,
3 that's a felony. Which, to the extent
4 there is a crime, it's certainly not a
5 felony. But we're seeing that more and
6 more.

7 JUDGE HANTZ MARCONI: Well, and I
8 would guess even exceptions -- well,
9 exceptions or suspension, if you will --
10 of a restraining order to allow someone
11 to go into the house can be seen by -- to
12 allow the offender to go into the house
13 to get stuff or whatever -- can be seen
14 as an accommodation and pretty
15 intimidating to the victim. That they're
16 losing control of, again, their space.

17 INV. BERNIER: Couple things that --

18 MS. LAFRANCE: Can I --

19 INV. BERNIER: -- are my new
20 favorites --

21 MS. LAFRANCE: Yeah, can I just --
22 I'm sorry. Can I just step -- can I just
23 comment on what Steve just said because I
24 want to get to the Richards issue.

25 There's differences. Because as a



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1 prosecutor I saw it, and now as someone
2 who also, you know, helps people get
3 restraining orders and defends against
4 them.

5 I bring Richards issues because I'm
6 an officer of the court. And if I feel
7 that the other side can potentially
8 incriminate themselves, I feel it is my
9 duty to bring it to the court's
10 attention. I don't do it as some kind of
11 ploy to intimidate the witness. I did it
12 last week -- or two weeks ago, because
13 mutual restraining orders, the person --
14 the other side -- was literally charged
15 with a crime, not my client.

16 So I informed the court she had
17 potential Richards issues because if she
18 testified in the restraining order
19 hearing, she could potentially
20 incriminate herself. Again, as an
21 officer of the court, I felt it was my
22 duty to raise that issue. I did it as a
23 prosecutor as well.

24 But the -- where it it's abused is
25 that -- and as a prosecutor I got this --



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1 these Richards issues from defendants
2 because they felt their client was right,
3 and their client was saying, well, the
4 victim did this, this, this, and this, so
5 they have a Richards issues. I'm like,
6 no, no, no. That's not a Richards issue.
7 Just because your client is saying that
8 the victim did this doesn't mean she has
9 a Richards issues.

10 If there was something in the police
11 report where the victim said, I came at
12 him first or I did that, well, yes, they
13 would have a Richards issues. But if
14 the -- if -- what's in the police report,
15 there are no Richards issues in that
16 police report, you don't raise it.

17 So there's a difference with
18 something that the victim is admitting to
19 doing that potentially might raise Fifth
20 Amendment concerns and what I used to
21 call what a defense wish they would
22 testify to, which they're not.

23 JUDGE HANTZ MARCONI: Right. But of
24 course I'm --

25 MS. LAFRANCE: So I think it's -- we

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1 need to be clear with that.

2 JUDGE HANTZ MARCONI: For our --

3 yeah. I get that little piece of this.

4 For our purposes, though, we're looking
5 at whether -- and again, this came from
6 some comments that had come in through
7 the public comment line -- whether there
8 is, sort of, this effort, if you will, to
9 have offenders sort of use the system

10 beyond even a Richards issue, but in

11 other ways. Filing other parenting
12 petitions or other things to harass or
13 control victims. And I'm just trying to
14 get to is this a -- is there more than
15 this one issue, and is it something that
16 we should be making recommendations on.

17 Or even this one. But not just this one.

18 INV. BERNIER: Ex partes seem to be
19 the new topic. Are the new -- you know,
20 the new way to go about things. If a DV
21 petition is served -- and I've lost count
22 of how many defendants will go and file
23 that ex parte for sole custody claiming
24 that the victim is crazy. And then you
25 end up with a defense attorney involved,



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1 and then you have a victim fearing that
2 they're going to lose their children, so
3 they drop the restraining order. That's
4 one of them.

5 The other course of tactic is
6 utilizing -- because they can do civil
7 standbys, because they can contact the
8 police, is having well-being checks done
9 on the kids every single day. Or
10 deciding that they need something from
11 the house every single day because the
12 order kind of allows that to happen.

13 Those are two biggies.

14 I -- with the ex parte, I've even
15 charged -- I've charged witness tampering
16 with it under certain circumstances. And
17 sometimes you can get around that. But
18 I've found that using other civil
19 processes has absolutely become more of a
20 thing.

21 JUDGE HANTZ MARCONI: Good to know.

22 All right. We're ten minutes past.
23 I was going to make you all volunteer in
24 real time today, but I'm not going to do
25 that. But I am going to be looking for

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1 volunteers to assist with the synthesis
2 and coordination, and sort of, shaking
3 out a first draft of some
4 recommendations. I would like a couple
5 people per charge. Something that, you
6 know, catches your interest to dig a
7 little deeper and make some concrete
8 recommendations.

9 So in collaboration with the staff
10 types, our little writing committee,
11 that's going to be working and digging
12 down. So I will be looking for that by
13 email. I'm going to be looking for a
14 raised hand from everybody. And we will
15 put together a working draft with working
16 parts. We will be circulating it in
17 probably bits and pieces.

18 We will be anticipating a few more
19 meetings. I know you will miss my
20 smiling face, so don't worry, we'll be
21 back together. But we're going to take a
22 little bit of time and try to synthesize
23 and organize the work that we've to date.

24 Continue with your, again, comments
25 and suggestions in writing. To bring



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1 them in, something you forgot about, or
2 something that came up while we were
3 chatting today. And make your own lists
4 because I don't want to leave anything
5 out of our final collaborative process.

6 Anything else today? All right.

7 Again, thank you. Till next time.

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1 C E R T I F I C A T I O N

2

3 I, Grace Markarian, certify that the
4 foregoing transcript is a true and
5 accurate record of the proceedings.

6

7

8

9 Grace Markarian

10 Grace Markarian (CDLT-258)

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17 Date: March 3, 2022

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